



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Criminal Appeal 137 of 2009**

NETTO INYANJE MUSIKOYE 1ST APPELLANT
FREDRICK INYANJE WENDO 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

{CONSOLIDATED CRIMINAL APPEALS
NOS. 137, 138, 139 and 140 OF 2009}

J U D G M E N T

1. The Appellants herein, Fredrick Inyanje Wendo and Netto Inyanje Musikoye were charged with the offence of breaking into a building and committing a felony contrary to **Section 306 (a)** of the Penal Code. The particulars of the offence were as follows;

“On the night of 11th 12th days of July 2009 at Saosi village, Serem S/location, Shamakhokho Location in Hamisi District within the Western Province jointly with others not before court broke and entered a building namely a Mulimani P.A.G. Church and committed therein a felony namely theft of six table chairs and one coffee table valued at KShs.9,200/=.”

2. They also faced the alternative charge of handling stolen goods contrary to **Section 322 (2)** of the Penal Code. They were alleged to have been found possession of the five chairs and one coffee table aforesaid on 13.7.2009 at Serem Market, Hamisi District.
3. The two admitted the main charge and were each sentenced to serve six (6) years imprisonment. Their appeal is against that sentence which they say is harsh in the circumstances of the cases.
4. Learned State Counsel, Mr. Karuri concedes that the sentences imposed are too harsh and agrees that this court should reduce the same.
5. I am aware that sentence is a matter of discretion and that an appeal, the issue of sentence can only be addressed by adhering to the sentence of the Court of Appeal in Macharia vs R [2003] E.A. 559 where the court held as follows;

“The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor (1954) EACA 270 where the predecessor of this Court stated:

“The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs R. (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. vs. Shershawsky (1912) CCA 28 TLR 263.”

6. In Peter Wandahwa Walubengo vs R. Criminal Appeal No. 284/2007 (UR) the court added as follows

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“Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise of discretion in sentencing, for the Court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence – see Ambani vs Republic (1990) KLR 161.

7. I am appropriately guided and in this case, the Appellants admitted the offence and saved precious judicial time. They were also quick to point out the stolen items when they were arrested and all the five chairs and one coffee table were recovered. They have been in custody since July 2009 and I think that the sentence imposed was too harsh when all circumstances are considered.
8. Since they were also first offenders I will order that their sentences be reduced to the one already served and they will be released unless they are otherwise lawfully held.
9. Orders accordingly.

Delivered, dated and signed at Kakamega this 21st day of

April, 2010

ISAAC LENAOLA

J U D G E